No. 83-491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

—v.—

ADAN LOPEZ-MENDOZA and ELIAS SANDOVAL-SANCHEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the Immigration and Naturalization Service use in deportation proceedings evidence its agents obtain in violation of the Fourth Amendment?

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STATEMENT OF THE CASE

In separate deportation proceedings, Respondents Adan Lopez-Mendoza and Elias Sandoval-Sanchez tried unsuccessfully to prevent the use of evidence unlawfully obtained by Immigration and Naturalization Service (INS) agents.

1. Respondent Lopez was arrested by INS agents in August 1976 at his workplace, a wholesale transmission repair shop in San Mateo, California. Nearly a full month before the arrest, INS Agents Eddy and Elder received an interoffice memorandum regarding a tip received by INS that seven named illegal aliens were working there (L.A.R. 34, 140).[1/] The agents failed to corroborate the tip either by conducting a record search or by investigating further. The day before the

1/ "L.A.R." refers to the administrative record in Lopez-Mendoza; "S.A.R." refers to the administrative record in Sandoval-Sanchez.

arrest, however, they drove by the shop, confirmed its location, and telephoned the informant, a person previously unknown to them, to verify the allegations. Based solely on their telephone conversation, which yielded no additional details, they decided to visit the shop the next day for the purpose of interviewing the persons named by the informant (L.A.R. 34-35, 50-51, 66). At no time did the agents seek an arrest warrant for the named individuals or a search warrant to enter and search the private business premises. In fact, they had concluded that they did not have enough information to obtain either an arrest or search warrant (L.A.R. 50,55,74,81).

The two agents arrived at the shop at approximately 7:45 a.m. One agent approached the owner, Art Bradley, to request permission to conduct the interviews while the other stationed himself at the only door so that

anyone inside would be prevented from leaving the premises. The owner refused permission for interviews during working hours "without a court order" (L.A.R. 38), and suggested that they come back at noon while the workers were eating lunch. Because the agents "didn't feel like waiting four hours" by the door in order to apprehend anyone leaving (L.A.R. 81), they persisted in their demand for immediate interviews. As their persistence intensified, so did the owner's agitation, until he eventually demanded that the city police be called (L.A.R. 106).

While agent Elder diverted the attention of the owner, agent Eddy advanced into the shop and approached Lopez. The agent chose him for questioning solely because he was "relatively isolated" and therefore the owner could not interfere with the interview (L.A.R. 44). Nothing in Lopez's appearance, behavior, or speech had aroused the agent's

suspicion. Furthermore, according to the government's version of the facts, Lopez's name was not on the list provided by the informant. In response to the agent's questioning, Lopez gave his name and indicated that he was from Mexico with no close family ties in the United States (L.A.R. 40-41). The agent placed him under arrest. The agent also questioned another worker, Nelson Melendez, a permanent resident of the United States, who was asked for his name and whether he was a citizen or resident of the United States (L.A.R. 106). Both agents then engaged in an argument with Bradley, which at this point bordered on a physical confrontation (L.A.R. 62). Bradley placed himself between the agents and Lopez and indicated that they had no right to remove him without a court order. Agent Eddy emphatically poked Bradley on the chest with his finger and said that if he continued to

interfere, they would arrest him (L.A.R. 63). They then departed with Lopez in custody.

Lopez underwent further interrogation at INS offices where, without advice of counsel, he allegedly indicated he was born in Mexico, was still a citizen of Mexico, and that he entered without inspection (L.A.R. 118-119). Based on his answers, the agents prepared the I-213, "Record of Deportable Alien," and accompanying affidavit (L.A.R. 135-137).

The only evidence introduced by the INS against Lopez at his deportation hearing was the Form I-213 and the accompanying affidavit. Prior to the proceeding on the merits, Lopez, through counsel, sought a hearing on the legality of the arrest (L.A.R. 32). The immigration judge commenced a hearing, but prior to its completion, determined that an illegal arrest did not

affect "the propriety" of the proceeding. He therefore declined to make findings of fact regarding the legality of the arrest (L.A.R. 113-114), although he did allow counsel for Lopez to make an offer of proof (L.A.R. 101-107). The immigration judge found him deportable, and granted him the privilege of voluntary departure (L.A.R. 28).

The Board of Immigration Appeals dismissed Lopez's appeal, relying upon its decision in Matter of Sandoval, 17 I. & N. Dec.70 (BIA 1979), in which contrary to its prior longstanding practice, it had concluded that the exclusionary rule does not apply in deportation proceedings.

2. INS arrested Respondent Sandoval in 1976 during a raid at his workplace, a food processing plant in Pasco, Washington. INS agents surrounded the plant to guard the exits on all four sides (S.A.R. 40). Investigator Bower, an INS law enforcement

officer, and Officer Spence, a uniformed Border Patrol officer, entered the plant and stationed themselves at the entrance to the main work area during a change of shift. They checked the workers as one group filed past to leave work and another group filed past to enter the main work area (S.A.R. 50). Elias Sandoval was in a line of workers entering the main work area to commence work on the 3:00 p.m. shift (S.A.R. 65). He was dressed in his work uniform, which included a hard hat, apron, and face mask (S.A.R. 27, 49, 65-66). Sandoval testified that he observed a man in uniform who appeared to be a police officer (S.A.R. 66), and that this officer forcibly seized him by the back of the pants and the shoulder, took him out of line and placed him in the men's rest room of the plant (S.A.R. 64-65).[2/] After being held

[2/] It is unclear from the record whether any immigration officer said anything to Sandoval

in the men's rest room, Sandoval was one of at least 37 people taken to the Pasco Police Department for further processing (S.A.R. 41, 56).

At the deportation hearing, Investigator Bower had no specific or even general recollection of the initial contact, subsequent conversation, interrogation, apprehension and detention of Sandoval (S.A.R. 40-41, 43-44, 49-50).[3/] Bower

prior to his detention. Mr. Sandoval's counsel, Charles Barr, asked Sandoval whether the immigration officer said anything to him in English prior to his telling him to go to a the rest room (which the officers used as holding area for those they wished to question further, S.A.R. 47, 52). Mr. Sandoval's response is not recorded. (The record contains numerous omissions of Sandoval's testimony at S.A.R. 62-66, 68.).

[3/] In response to a question from Mr. Barr as to why Officer Bower believed he had probable cause to detain Mr. Sandoval, Officer Bower testified:

A. We just initially detained because of the large number of people coming in and out of there. I initially detained them to question them further. Some people immediately said that they had United States

testified that his general practice was that if there were some kind of furtive conduct in line, he would question the subject in English. If the subject failed to respond, Bower's practice was to ask in Spanish if the particular person had any papers and sometimes to question that person further or detain him to question at a later time (S.A.R. 27, 54-55).

citizen wife, or maybe United States citizen children, and would fall within a category that they may have something going for them. Some were detained for more interrogation to figure out whether they would be taken, left at the plant or whether they would be further processed in the processing facility, which happens to be the Pasco Police Department in that area.

Q. That is your complete rationale?

A. Yes.

Q. A large number of people, temporary detention, in order to investigate further at your convenience?

A. A lot of them were talked to further there and ones that had wives, ones that had kids, ones that were single, determining which we handled in which manner, whether they should even be left there at the plant. For instance, I had one present a document of some kind of another, wanted to talk to him more, at the time too busy talking to everybody else, he had to wait for further questioning. (S.A.R. 55-56).

At the Pasco Police Department, Sandoval was processed by Officer Bower who did not advise Mr. Sandoval of his rights (S.A.R. 58). Officer Bower explained to Sandoval the I-274 (voluntary departure) process, including his right to a deportation hearing and counsel. Sandoval refused to sign the I-274 requesting voluntary departure and asked for his counsel, Charles Barr (S.A.R. 59-60). Officer Bower asked Sandoval a series of questions concerning his immigration status. Based on the answers to these questions, Officer Bower filled out an I-213, "Record of Deportable Alien," in which he indicated that Sandoval was born in Mexico and that he entered the U.S. without inspection (S.A.R. 81).

During the deportation hearing the government offered the I-213 to prove deportability (S.A.R. 46). Sandoval's counsel moved to suppress the I-213 and to

terminate the proceedings (S.A.R. 61-62). By counsel, Sandoval argued to the immigration judge that the evidence relied upon by the government should be suppressed because the warrantless arrest was unlawful and the I-213 was the "fruit of poisonous tree." The immigration judge ruled that the arrest did not violate the Fourth Amendment, stating as follows: "The respondent could have at some time during the time in question reacted in a furtive manner in the presence of the officials. This plus foreign appearance would give rise to a suspicion of alienage. . . . The respondent has failed to prove that this is not what took place in this case" (S.A.R. 28-29). Based on the written record of Sandoval's admissions contained in the I-213, the immigration judge found him deportable.

On appeal, the Board of Immigration Appeals held that Sandoval's statements were

voluntary and found "no basis to conclude . . . that the circumstances of the respondent's arrest affected the statements contained in the form I-213" (S.A.R. 17-18).

3. On petitions for review of their deportation orders, the Ninth Circuit consolidated the cases for argument en banc, and held in a seven to four decision that 1) Sandoval's detention at the police station constituted an arrest not based upon probable cause, and was therefore unlawful under the Fourth Amendment; 2) that the statements of illegal alienage Sandoval made were a product of the unlawful detention within the meaning of Brown v. Illinois, 422 U.S. 590 (1975); and 3) that "the exclusionary rule bars the INS from using, in deportation proceedings, evidence of statements it obtains illegally." 705 F.2d at 1061. The court therefore reversed Sandoval's order of deportation. Lopez's order of deportation was

vacated and remanded for further proceedings in light of its decision in Sandoval's case.[4/]

In reaching its decision, the court of appeals applied the analysis set forth in United States v. Janis, 428 U.S. 433 (1976). The court first examined the strength of the connection between those who illegally obtained the evidence, and those that seek to use it in a subsequent proceeding. The court observed that not only are the officers and prosecutors members of the same government agency, but they also share a common goal and purpose. The INS agents who interrogated Sandoval after arresting him "did so exclusively to aid in filling out INS Form I-213, the form used by INS attorneys at Sandoval's deportation hearing to prove deportability." 705 F.2d at

[4/] The question of whether Lopez's detention violated the Fourth Amendment was not adjudicated in his deportation hearing.

1069.

The court next considered the extent to which the persons whose "conduct is to be controlled" are already subject to the deterrent effects of the rule. Because deportation of illegal aliens is the prime concern of immigration officers, rather than criminal prosecutions,[5/] the court concluded that deportation is within the agents' "zone of primary interest." The court therefore deemed it "highly unlikely that INS officers will be deterred from violating the Fourth Amendment by the prospect of unsuccessful criminal prosecutions," 705 F.2d at 107, and found the marginal deterrent value of imposing the sanction in deportation proceedings to be direct, substantial, and efficient.

5/ The court noted that fewer than 2% of deportable aliens who are apprehended are

Although the court acknowledged that there is authority that the sanction is "routinely" applied in "core" cases like the present one where the deterrent value is strong, the court proceeded under Janis to assess the "social cost of applying the exclusionary rule in deportation proceedings and to balance that cost against the substantial deterrent impact of the sanction on INS misconduct." 705 F.2d at 1071. In terms of the numbers of aliens who would escape deportation by the suppression of illegally obtained evidence, the court found that, based on past INS experience with the rule, "only an infinitesimal fraction of the illegal alien population will mount challenges based on the exclusionary rule and that the small number who do so successfully will not appreciably increase the number of

ever convicted of criminal violations of immigration laws. 705 F.2d at 1069.

illegal aliens in our midst." Id. The court rejected after close scrutiny the government's argument that the courts will be sanctioning a continuing violation of the immigration laws, and concluded that "the marginal deterrent benefit far outweighs the social cost of barring the INS from using in deportation proceedings evidence its officers seize in violation of the Fourth Amendment." 705 F.2d at 1073. The court also examined and rejected as "unrealistic and unacceptable" each of the alternatives to the exclusionary rule suggested by INS. 705 F.2d at 1073-1074. In sum, the court concluded, based in part on past INS experience with the rule, that the "only realistic way" to ensure that INS agents respect the values embodied in the Fourth Amendment is to apply the exclusionary rule in deportation proceedings. 705 F.2d at 1075.

REASONS FOR DENYING THE PETITION

The decision below represents the first time a federal court has re-examined the issue of whether the exclusionary rule applies in deportation proceedings since the Board of Immigration Appeals (BIA) in 1979, in the words of the court below, "cut against the grain of its own historic practice and the views of every court and commentator to have considered the issue," and held, in a case unrelated to this one, that the exclusionary rule does not bar the INS from using evidence obtained in violation of the Fourth Amendment. Matter of Sandoval, 17 I. & N. Dec.70,93 (BIA 1979) (sanctioning use of evidence seized by INS agents during illegal search of an alien's home). In holding that the rule does apply, the court of appeals

follows a long and consistent history of the rule's application in deportation proceedings by the federal courts. There is no conflict among the circuits. The only other court of appeals to have expressly considered the issue has held that the rule applies, following what had long been thought to be settled law in this area. Wong Chung Che v. INS, 565 F.2d 166 (1st Cir. 1977). Contrary to the government's characterization of the question presented as whether the rule should be "extended," and its assertion that the Ninth Circuit's decision creates a "new barrier" which threatens "mortal injury" to enforcement of immigration laws, the decision below merely marks a return to longstanding former practice. Until 1979, the INS "performed its investigative and prosecutional functions in a legal regime in which the exclusionary rule was thought to apply." 705 F.2d at 1065.

The decision below also fully comports with the applicable decisions of this Court. There is no question that protections of the Fourth Amendment apply to aliens discovered in this country.[6] The government so concedes. (Pet. at 12). Moreover, the government does "not contend that the civil nature of a deportation proceeding is necessarily controlling." (Pet. at 21).[7]

[6] See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Abel v. United States, 362 U.S. 217 (1960). Important Fourth Amendment values to be preserved include safeguarding the privacy and security of individuals, protecting against undue interference with the rights of lawabiding persons, and avoiding unsettling or frightening shows of authority by government officials. See, e.g., Almeida-Sanchez v. United States, 413 U.S. 266, 273-274 (1973); see also Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976).

[7] Categorizing deportation proceedings as quasi-criminal rather than as civil provides an alternative justification for the holding below, although the court of appeals did not rely on that ground in reaching its decision, 705 F.2d at 1065 n.9. Deportation is imposed for violation of the same immigration laws on

The government concedes that the court below was correct in engaging in the same inquiry this Court made in United States v. Janis, 428 U.S. 433 (1976), a cost-benefit analysis, but suggests that it "went wrong in the values it brought to its analysis." (Pet. at 12, emphasis added.) As discussed below, the Ninth Circuit's decision properly applied the analysis set forth in Janis, and carefully weighed the effects of applying the rule in this context. The court below recognized and appreciated the "intractable nature of the problem of illegal immigration" and the "magnitude of the enforcement task that

which criminal prosecutions are based, and in many cases, deportation poses a more serious penalty than that usually imposed in criminal prosecutions. See Bridges v. Wixon, 326 U.S. 135, 154 (1945); Matter of Sandoval, 17 I. & N. Dec. at 96 (Applemen, Bd. member, dissenting). Deportation proceedings thus closely resemble criminal forfeiture proceedings, and application of the exclusionary rule may therefore be justified under the rationale of One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 393 (1965).

Congress has assigned INS." 705 F.2d. at 1073. Based upon past experience of applying the rule in deportation proceedings, as well as the BIA's post-Sandoval practice of reaching Fifth Amendment issues, including under this rubric particularly flagrant Fourth Amendment violations, the court below was justified in concluding that its decision would not overburden the INS enforcement system. The BIA itself has conceded that application of "the rule would not appear to have the potential to significantly impact on this country's immigration laws and policies," Matter of Sandoval, 17 I. & N. Dec. at 80.

Prudential considerations militate against granting the government's petition as well. The government chose not to seek review of the court of appeal's ruling that INS violated the Fourth Amendment by illegally arresting Respondent Sandoval (Pet.

at 20, n.14), and no determination has ever been made on the underlying Fourth Amendment issue with regard to Respondent Lopez. At the same time, the government appears unwilling to concede an underlying Fourth Amendment violation in this case. For example, the government argues that there is no demonstrated need to invoke the exclusionary rule "where it is not at all clear that any Fourth Amendment violation actually occurred." (Pet. at 22). The government cannot have it both ways, and should not have asked this Court to anticipate a question of constitutional law in advance of the necessity of deciding it. As this Court noted last term in Illinois v. Gates, ___ U.S. ___, 76 L.Ed.2d 527, 539, 103 S.Ct. ____ (1983), "[w]here difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on

our discretion." By failing to raise the substantive Fourth Amendment issue, the Solicitor General seeks to force the Court to reach the exclusionary rule issue without permitting it the option, as in Gates, of a substantive resolution of the case. This Court, as a prudential matter, should not exercise discretionary review in any Fourth Amendment case in which the government fails to provide it with a full range of dispositional options. Furthermore, where there is no conflict of decision in the circuits, and where there has been such a recent change of policy by the BIA, further consideration of the ramifications of the problem, including an opportunity for INS to collect and analyze data on the impact of the rule on its workload, would enable the issue to receive further study before it is addressed by the Court. See McCray v. New York, No. 82-1381; Miller v. Illinois, 82-

5840; and Perry v. Louisiana, No. 82-5910, 51 U.S.L.W. 3855 (May 31, 1983) (Opinion of Stevens, J., respecting the denial of the petitions for writs of certiorari in jury peremptory challenge cases).

1. For much of this century, it has been assumed by federal courts, federal enforcement officers, and immigration law practitioners that the exclusionary rule applies in deportation proceedings. Sixty years ago, on the only occasion this Court has had to comment on the question, it stated in dictum that "[i]t may be assumed that evidence obtained by the [Labor] Department through an illegal search and seizure cannot be the basis of a finding in deportation proceedings." United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923). The federal courts which have squarely confronted the question have all held that evidence illegally obtained by

federal agents is inadmissible in subsequent deportation proceedings.[8] Other courts have assumed that the rule applies in their discussions of underlying Fourth Amendment issues.[9] Until 1979, the INS itself

[8] Lopez-Mendoza and Sandoval-Sanchez v. INS, 705 F.2d 1059 (9th Cir. 1983), petition for cert. filed, No. 83-491 (September 22, 1983); Wong Chung Che v. INS, 565 F.2d 166 (1st Cir. 1977); Ex parte Jackson, 263 F.110, 112-13 (D. Mont.), appeal dismissed sub. nom. Andrews v. Jackson, 267 F. 1022 (9th Cir. 1920) (district court granted writ of habeas corpus to an alien held for deportation, stating that "the deportation proceedings [were] unfair and invalid, in that they [were] based on evidence and procedure that violate the search and seizure and due process clauses of the Constitution"); United States v. Wong Quong Wong, 94 F.832 (D. Vt. 1899) (relying on Boyd v. United States, 116 U.S. 616 (1886), in which evidence obtained in violation of the Fourth Amendment was excluded from quasi-criminal forfeiture proceeding, the district court reasoned that the "constitutional safeguards [of the Fourth Amendment] would be deprived of a large part of their value if they could be invoked only for preventing the obtaining of such evidence, and not for protection against its use").

[9] E.g. Huerta-Cabrera v. INS, 466 F.2d 759, 761 n.5 (7th Cir. 1972); Yam Sang Kwai v. INS, 411 F.2d 683, 690 (D.C. Cir. 1969),

"accepted and appled the rule . . . for many years and in countless cases since the dictum in U.S. ex rel. Bilokumsky v. Tod. . . ." Matter of Sandoval, 17 I. & N. Dec.70,93 (Applemen, Bd. member, dissenting). Consistent with this state of affairs, a leading immigration law treatise observed that "[i]t is undisputed . . . that the Fourth Amendment's prohibition against unreasonable searches and seizures applies in deportation proceedings, and that evidence obtained as the result of the unlawful search

cert. denied, 396 U.S. 877 (1969) (Wright, J., dissenting) ("[I]n my view the statement was the fruit of an [illegal] seizure. . ., and should not have been admitted."); Klissas v. INS, 361 F.2d 529 (D.C. Cir. 1966); Vlissidis v. Anadell, 262 F.2d 398, 400 (7th Cir. 1959). More recently, courts have viewed the issue as an open question, but have not reached the issue because of underlying Fourth Amendment holdings that the evidence was lawfully obtained, e.g., Babula v. INS, 665 F.2d 293, 301 n.4 (3d Cir. 1981) (Adams, J., concurring); Carnejo-Molina v. INS, 649 F.2d 1145, 1149 n.3 (5th Cir. 1981).

cannot be used."[10/]

2. The court below correctly applied the analytical framework established in United States v. Janis. In Janis, the Court declined to apply the exclusionary rule in a federal civil tax proceeding involving an intersovereign violation of the Fourth Amendment where state criminal law enforcement officials seized evidence in reliance on a defective warrant. This case, in contrast, involves not only an intrasovereign violation, but also an intraagency violation, where the evidence was obtained for use by the INS in the officer's "zone of primary interest." United States v. Janis, 428 U.S. at 455 n.31, 458. The connection between those who illegally obtained the evidence and those who seek to

10/ 1A C. Gordon and H. Rosenfield, Immigration Law and Procedure §5.2c at 5-31 (rev. ed. 1977).

use it in a subsequent proceeding could not be more direct.[11] The offending officer and the agency which uses the evidence share a common goal and purpose, and the deterrent impact of invoking the rule in deportation proceedings is accordingly "substantial and efficient." See United States v. Janis, 428 U.S. at 453; see also United States v. Calandra, 414 U.S. 338, 348 (1974); Tirado v. Commissioner of Internal Revenue, 689 F.2d 307, 310 (2d Cir. 1982), cert. denied,

[11] The INS is responsible not only for apprehending deportable aliens and initiating proceedings against them, but also for adjudicating their entitlement to remain in the country. Moreover, Administrative Procedure Act provisions that insulate agency employees responsible for adjudication from supervision or direction by employees carrying out investigative and prosecutorial functions, 5 U.S.C. §554(d)(2), have been held inapplicable to INS adjudications. See Marcello v. Bonds, 349 U.S. 302, 305-10 (1955). Recently, INS adjudicative functions have been reorganized under a newly created office, the Executive Office for Immigration Review, under the Associate Attorney General's supervision. See 48 Fed. Reg. 8038-39, 8056-57 (February 25, 1983).

U.S. _____, 75 L.Ed.2d 484, 103 S.Ct. 1256 (1983). The government itself concedes that application of the rule may deter immigration agents from committing Fourth Amendment violations. (Pet. at 21).

The government's petition instead focuses on two criticisms of the court's analysis below: 1) that the social costs from applying the exclusionary rule to deportation proceedings are greater than the court of appeals acknowledged (Pet. at 14-20); and 2) that there is no demonstrated need for such a "severe measure." (Pet. 20-26). Upon examination, however, these criticisms are undermined by the government's less-than-candid failure to acknowledge that until recently, the INS operated under a regime in which the exclusionary rule was thought to apply. The government's abstract and greatly exaggerated discussion of practical effects of the rule's application

is strong indication that past INS experience under the rule does not in fact document the speculative fears the government now relies on.

The government first points to the social cost of "freeing an illegal alien and allowing him to perpetuate his unlawful presence in this country," labelling it a judicial "licensing of continuing unlawful conduct."[12/] (Pet. at 13). No such grant of immunity from immigration laws results from application of the rule. This Court has declined to adopt a "per se" or "but for" rule that would make inadmissible any evidence which comes to light through a chain

12/ Entering the United States without inspection is a misdemeanor, 8 U.S.C. §1325. It is an offense which is completed at the time of entry, and is not a continuing one so as to toll the statute of limitations. E.g., United States v. Rincon-Jimenez, 595 F.2d 1192 (9th Cir. 1979); see also United States v. Cores, 356 U.S. 405, 408 n.6 (1958).

of causation that began with an illegal arrest. Brown v. Illinois, 422 U.S. 590, 603 (1975) ("The workings of the human mind are too complex and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test.") At any time, INS may proceed in deportation proceedings with untainted evidence, even in the same proceeding in which other, tainted evidence has been suppressed. Contrary to the government's assertion (Pet. at 15, n.8), INS has frequently been able to sustain its burden of showing that other evidence of deportability remains untainted by the official misconduct.[13/]

13/ See Matter of Sandoval, 17 I. & N. Dec.70,93 (BIA 1979) (Applemen, Bd. member, dissenting) ("As the majority notes, the Board has often pointed to untainted evidence in cases involving this issue, as the basis for its decision, and has refused to rely on evidence which might be flawed by a Fourth Amendment violation."); see also, e.g., Carnejo-Molina v. INS, 649 F.2d 1145, 1148-49 (5th Cir. 1981).

Even if some few illegal aliens go free, the number of aliens freed by application of the rule in the past has been inconsequential, statistically insignificant. 705 F.2d at 1071. These few have not unduly burdened the enforcement system.[14] Furthermore, they remain subject to the immigration laws, and may be apprehended and

[14] The government cannot seriously maintain that the social cost of releasing a criminal who preys on individuals or society is less than the cost of releasing an alien apprehended while going about his or her work. Furthermore, contrary to the government's assertion, the few aliens who may go free as a result of the court's decision cannot be said to pose a collective economic threat to this country. (Pet. at 14 n.7). Indeed, commentators have recently questioned the assumption that the presence of the entire class of undocumented aliens poses a threat to the country's economic well-being. As noted in Developments in the Law: Immigration Policy and the Rights of Aliens, 96 Harv.L.Rev. 1286, 1443 (1983), "on balance, undocumented aliens probably benefit the economy -- a fact that may account for Congress' failure to take strong action against their presence." See also Plyler v. Doe, 457 U.S. 202, 228 (1982).

deported through use of untainted evidence, just as are other members of this "shadow population." See Plyler v. Doe, 457 U.S. 202, 218 (1982). INS often receives tips from reliable informants who are ex-spouses, landlords, neighbors or co-workers, and uses this information to apprehend undocumented aliens. The fact that the undocumented alien was previously the subject of an unlawful arrest, and made admissions which were suppressed, does not act as a bar to any subsequent proceeding untainted by the former one.

The more far-reaching cost, the government claims, is damage to the immigration litigation system which will result from merely allowing suppression motions to be brought. The government emphasizes the summary nature of most deportation proceedings and argues that any significant intrusion of complex

constitutional questions will "overload the system to the point of breakdown." (Pet. at 18). Contrary to the assumption implicit in such an argument, however, refusal to apply the exclusionary rule will not eliminate suppression motions from the litigation process. This Court long ago held that an alien who has succeeded in entering the country possesses a right to a hearing on the issue of deportability which must comport with Fifth Amendment guarantees of due process.[15] Accordingly, the BIA permits inquiry into allegations of Fifth Amendment violations and excludes evidence where circumstances surrounding an arrest or interrogation would render admission "fundamentally unfair." See Matter of Toro,

[15] See, e.g., Bridges v. Wixon, 326 U.S. 135, 154 (1945); Kaoru Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903); Wong Wing v. United States, 163 U.S. 228, 242 (1895) (Field, J., concurring).

17 I. & N. Dec. 340, 343 (BIA 1980); Matter of Garcia, 17 I. & N. Dec. 319, 321 (BIA 1980); see also In re Rosa Ramira-Cordova, A21 095 659 (BIA Feb. 21, 1980) (INS officers seized evidence in violation of Fourth Amendment in manner so egregious as to offend the Fifth Amendment's due process requirements of fundamental fairness). Elimination of Fourth Amendment suppression motions has not and cannot significantly reduce the burdens and delays the system already faces and has coped with in the past.[16/]

[16/] In 1979, 966,137 aliens accepted voluntary departure, while only 25,888 were deported after formal hearings. Staff of Select Comm'n on Immigration and Refugee Policy, U.S. Immigration Policy and The National Interest, App. G at 73 (1981). There are incentives for waiving a hearing built into the system, especially if the alien wishes to reenter the country. A deported alien is barred from reentry unless he or she obtains the express consent of the Attorney General. Reentry without such consent is a felony. Immigration and Naturalization Act of 1952 (INA) §276, 8

Next, taking a position essentially foreclosed by its decision not to seek review of the court's resolution of underlying Fourth Amendment claim, the government attempts a "back door" challenge to that holding. As this Court noted in United States v. Janis, 428 U.S. at 443, however, "the issue of admissibility of evidence in violation of the Fourth Amendment is determined after, and apart from the violation." On the present record, the government cannot now argue, as it erroneously attempts to do in its petition,

U.S.C. §1326.

The vast majority of undocumented aliens apprehended by INS are not represented by counsel, and many choose voluntary departure because they are not familiar with their rights under U.S. law. The alien's right to counsel in civil deportation proceedings extends only to counsel retained at no expense to the government. See 8 U.S.C. § 1252(b)(2); 8 C.F.R. § 292.1. Thus, contrary to the government's conjecture, it is highly unlikely that suppression motions in deportation proceedings will become as common as they presently are in criminal cases. (Pet. at 18).

that "application of the exclusionary rule to a case like the present . . . one is not likely to 'deter' official misconduct, since it appears that none in fact occurred." (Pet. at 22). Having failed to seek review of the Fourth Amendment holding in Sandoval-Sanchez, this argument is unavailable.[17/]

[17/] There were significant violations of the Fourth Amendment in this case. We note that in any event the government's argument depends, in essence, on the creation of unprecedented constitutional authority for the INS to detain persons during factory or other workplace raids without particularized suspicion that any of the persons seized are actually present in this country illegally. See, e.g., Brief for the American Civil Liberties Union as Amicus Curiae in INS v. Delgado, No. 82-1271 (dated November 12, 1983). That issue, raised in Delgado, was not addressed by the court below and is not before the Court in this case. The court below rested its Fourth Amendment holding on the unlawfulness of the detention at the time Sandoval was interrogated at the police station.

Without citation of authority, the government also maintains that in a suppression hearing the "burden is placed upon the government to prove as to each individual alien that the discovery if his or

In fact, the government's failure to seek review of whether a Fourth Amendment violation took place in these cases is a transparent attempt to manipulate the decisional options open to the Court. As the Court made clear in Janis, the Court must be free to decide whether a substantive Fourth

her illegal status was not preceded by an illegal stop or arrest." (Pet. at 23). In an analogous criminal setting, however, this Court has stated that for purposes of the Fourth Amendment, one seeking to suppress evidence which is allegedly the product of an illegal search or arrest bears the burden of producing evidence that the search or arrest was in fact illegal. See, e.g., Rawlings v. Kentucky, 448 U.S. 98, 104-105 (1980); Nardone v. United States, 308 U.S. 338, 341 (1939). This rule had been adopted for use in deportation hearings prior to 1979. Matter of Sandoval, 17 I. & N. Dec.70,97 Applemen, Bd. member, dissenting) ("In the past the Board has demanded an acceptable nonfrivolous offer of proof as a minimum."); Matter of Tsang, 14 1. & N. Dec. 294 (BIA 1973). Once illegality is shown, the burden then shifts to the government to show that the connection between the lawless conduct and the discovery of the challenged evidence has become, under Wong Sun v. United States, 371 U.S. 471, 488 (1963), "so attenuated as to dissipate the taint." See Brown v. Illinois, 422 U.S. at 603-04.

Amendment violation has taken place before considering whether and to what extent the exclusionary rule operates in a given setting. See also Illinois v. Gates, supra (resolving substantive Fourth Amendment issue). In seeking to deliberately by-pass the Court's ability to consider the substantive Fourth Amendment issue, the government is improperly seeking to limit the Court's decisional options, rendering a denial of certiorari particularly appropriate in this case.[18/]

Finally, the court below properly rejected as both unrealistic and unacceptable the alternatives to the exclusionary rules suggested by INS. The government in its petition now urges a combination of

[18/] This is the second occasion this term in which the Solicitor has attempted in this way to force this Court's hand. See United States v. Leon, No. 82-1771, petition for cert. granted, 51 U.S.L.W. 3919 (June 27, 1983).

alternatives, with injunctive actions the primary remedy, backed-up by internal discipline, and the suppression by immigration judges of evidence seized through flagrant or intentional unlawful conduct, and supplemented by damage actions by citizens against individual INS agents.[19] These remedies have been used in the past to supplement the application of the exclusionary rule. However, these methods cannot by themselves be effective in deterring Fourth Amendment violations. See Stewart, The Road to Mapp v. Ohio and Beyond: The Exclusionary Rule in Search-and-Seizure Cases, 83 Colum.L.Rev.1365, 1386-1389 (1983).

As Justice Stewart has recognized,

[19] The government concedes, as it must, that undocmented aliens, particularly if they have been deported, are not likely to bring damage suits. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). (Pet. at 25 n.19).

equitable and standing prerequisites render injunctive relief extremely difficult to obtain even when violations may be flagrant or widespread. See City of Los Angeles v. Lyons, ____ U.S. ____, 75 L.Ed.2d 675, 103 S.Ct. 1660 (1983). Even if such hurdles can be overcome, the proof required to obtain an injunction presupposes that broad scale violations of rights have already occurred. See International Ladies Garment Workers Union v. Sureck, 681 F.2d 624 (9th Cir. 1982), cert. granted sub. nom. INS v. Delgado, ____ U.S. ____, 75 L.Ed.2d ____, 103 S.Ct. 1872 (1983); Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976), modified en banc, 548 F.2d 715 (1977). Accordingly, an injunction can be obtained only after the deterrence mechanism has failed.

Reliance on internal discipline requries self-policing, a laudatory goal, but one

which in the experience of other law enforcement agencies is rarely effective in deterring Fourth Amendment violations. It also depends in large part on the efficient reporting of complaints to INS by those citizens and undocumented aliens whose rights have been violated. Few of those who are deported are likely to make such complaints. Moreover, without a realistic reporting structure or system of incentives, few citizens or resident aliens are likely to pursue such complaints with the INS.

Reliance on suppression of evidence under a Fifth Amendment due process rationale for Fourth Amendment violations merely begs the question. If the exclusionary rule were applied for evidence seized in violation of Fourth Amendment rights, a due process rationale would be superfluous. It also reaffirms the compelling need for continued application of the rule in this context.

INS makes no showing, nor could it, that any of these suggested alternatives are realistic or viable. The petition does not confront the holding of the en banc majority which rejected these same alternatives. Evidentially INS has no factual basis for demonstrating that the alternatives are more than hypothetical; yet surely if they are, INS can document them in any petition at a later date. Absent such documentation, the argument based on alternatives does not provide any reason to grant the petition.

4. In sum, contrary to the government's assertions, application of the exclusionary rule in deportation proceedings does not break new legal ground. Until 1979, immigration agents functioned on the assumption that evidence they obtained in violation of the Fourth Amendment could not be used to prove illegal alienage. Reaffirmation of the rule's applicability

will not significantly impair the investigative or prosecutorial functions of the INS.[20/]

The court below correctly applied the approach adopted in Janis, which permits selective application of the rule in civil cases where the deterrent benefit outweighs the social cost of invoking the rule. The court carefully considered the costs and benefits of applying the rule, and concluded that "the best and indeed the only realistic way to ensure that immigration officers respect the precious values embodied in the

20/ As observed by the court below, past history demonstrates that application of the rule will not unduly burden INS: "The 200,000 deportation cases successfully prosecuted between 1971 and 1979, the millions of voluntary departures during the same period, and the paucity of cases terminated because of Fourth Amendment violations belie such a notion. We simply cannot believe that our confirmation of this historic view that the exclusionary rules applies in deportation proceedings will seriously impede the INS in the discharge of its statutory duties." 705 F.2d at 1075.

Fourth Amendment is to apply the exclusionary rule in deportation proceedings." 705 F.2d at 1075. Whatever the solution to the pressing problem of illegal immigration, it does not lie in judicial abandonment of Fourth Amendment values.[21]

[21] See, e.g., United States v Ortiz, 422 U.S. 891, 915 (1975) (White, J., concurring) ("Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country.")

CONCLUSION

The petition for a writ of certiorari should be denied.

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November 1983